JOHOR CAPITAL HOLDINGS SDN BHD

v.

FRANK KHOO SHAO HONG

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-2619-1999]
26 NOVEMBER 2001

CONTRACT: *Privity - Assignment - Whether rights, benefits and interest properly assigned to holding company - Notice of assignment - Whether valid and sufficient - Whether invalid notice renders agreement expired by effluxion of time*

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Assignment - Whether rights, benefits and interest properly assigned to holding company - Whether plaintiff has proper cause of action - Rules of the High Court 1980, O. 18 r. 19*

The plaintiff claimed that the defendant had entered into an agreement ("the option agreement") with their subsidiary, PJB Capital Sdn Bhd ("PJB"). One of the terms in the agreement was that the defendant was required to purchase shares of another company from PJB within the option period. It was submitted that the defendant had breached this agreement when they did not purchase the shares within the option period. Subsequently, PJB informed the defendant through a letter that the plaintiff would be assigned all their rights, benefits and interest. Following this, the plaintiff initiated a claim against the defendant seeking, *inter alia*, specific performance of the option agreement.

Relying upon O. 18 r. 19 of the Rules of the High Court 1980, the defendant applied to strike out the plaintiff's suit, claiming firstly, that the plaintiff did not have a cause of action on the premise that there was no privity of contract between them and the absence of any proper assignment pursuant to the option agreement. Secondly, the defendant contended that he was not served with a valid or sufficient notice pursuant to the option agreement and that the time frame for exercising the put and call option had expired.

The senior assistant registrar granted the defendant's application. This was an appeal by the plaintiff against the said decision.

Held:

[1] The option agreement was entered into between PJB and the defendant. Despite the fact that the plaintiff was the holding company of PJB, the two companies were separate and distinct corporate entities. Nowhere was it pleaded that the option agreement had been assigned to the plaintiff. In fact, no agreements had ever been entered between the plaintiff and the defendant. The plaintiff's failure to contradict the defendant's positive assertion should be treated as an admission by the plaintiff of the fact so asserted. (p 292 f-h)

[2] Even if there was a valid assignment, the option agreement had expired by effluxion of time because the plaintiff had failed to exercise their rights within the option period, considering that there was no valid or sufficient notice served on the defendant. Without the notice, there was no cause of action and, the time frame for exercising the put and call option had lapsed. (p 293 c-d)

[2a] The impugned notice was sent in a manner contrary to the option agreement as it was sent by ordinary post, and not by registered post; that it was sent to Capital Corp Securities Sdn Bhd, and not the defendant; and that it was sent to an address which was different from the defendant's address in the option agreement. (p 293 d-e)

[Appeal dismissed with costs.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14

Chartered Bank v. Yong Chan [1974] 1 MLJ 157

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 156

Datuk Lim Kheng Kim v. Malayan Banking Berhad [1993] 2 MLJ 303

Esso Petroleum Co Ltd v. Southport Corp [1956] AC 218

Farrel v. Secretary of State [1980] 1 All ER 166

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239

Lee Tee & Anor v. Seek Lai Neo & Anor [2000] 2 CLJ 761

Muniandy & Anor v. Muhamad Abdul Kader & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82

Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries [1989] 3 MLJ 246

Suppuletchmi v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(a), (b), (c), (d)

For the appellant/plaintiff - Mohd Izral Khairy; M/s Shearn Delamore & Co
For the respondent/defendant - TJ Su (HV Yoong); M/s Cheah Teh & Su

Reported by M Maheswaran

JUDGMENT

Vincent Ng J:
This is the plaintiff's appeal against the decision of the senior assistant registrar (SAR) on 26 May 2000 allowing the defendant's application to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court.

Shortly stated, the plaintiff alleged that, by a written agreement dated 24 June 1997 ('the option agreement'), entered into between PJB Capital Sdn Bhd, formerly known as PJB Capital Holdings Sdn Bhd ('PJB Capital') – a wholly owned subsidiary of the plaintiff – and the defendant the defendant had agreed, *inter alia*, to irrevocably grant PJB Capital a put option ('the put option'). By this put option PJB Capital secured a right to require the defendant to purchase 1,840,000 issued ordinary shares of RM1 each in Kai Peng Berhad ('the option shares') from PJB Capital at the exercise price, as defined in the option agreement which, *inter alia*, contained the following terms and conditions:

(a) the put option shall be exercisable by PJB Capital within the option period which shall be a period of six months, expiring on 24 December 1997, and commencing from the date of commencement of the option agreement unless extended by the parties in writing;

(b) extensions of the option period shall be on the same terms and conditions contained in the option agreement; and

(c) upon the exercise of the put option, PJB Capital shall sell and the defendant shall buy the option shares at the exercise price which is as defined in the option agreement.

It was pleaded that by an exercise notice dated 17 December 1997, PJB Capital exercised the put option and required the defendant to buy the option shares on 24 December 1997. Subsequently, by a letter dated 30 December 1997, PJB Capital agreed to extend the put option period by six months to 24 June 1998, and increased the exercise price and the number of option shares to 2,300,000. And, by a further exercise notice dated 17 June 1998, PJB Capital exercised the put option and required the defendant to buy the option shares on 24 June 1998. It was further pleaded that in breach of the terms and conditions of the option agreement, the defendant failed, refused and/or neglected to purchase the option shares and pay PJB Capital the exercise price amounting to RM24,398,400 as at 24 June 1998. And, by a letter dated 10 March 1999 PJB Capital informed the defendant that pursuant to cl. 19.2 of the option agreement, all its rights, benefits and interest in the said agreement 'will be assigned' to the plaintiff, being the holding company of PJB Capital, with effect from 24 December 1998.

Consequently the plaintiff claimed:

(i) specific performance of the option agreement;

(ii) damages in addition to or *in lieu* of specific performance;

(iii) interest at the rate of 8% per annum from 24 June 1998 till full and final payment of the aforesaid sums; and

(iv) costs.

Before the SAR there were only two issues raised by the defendant in his application to strike out the plaintiff's claim, being that:

(i) there was no privity of contract between the plaintiff and the defendant and the plaintiff had, neither in their pleadings nor their opposing affidavits shown that there was any or any proper assignment pursuant to cl. 19.2 of the option agreement, such as would clothe the plaintiff with a cause of action; and

(ii) even if there was proper assignment under cl. 19.2 of the option agreement, no valid or sufficient notice was ever served on the defendant pursuant to the option agreement, and that the time frame for exercising the put and call option had expired.

On the first issue, it must be borne in mind that the said agreement (exh. 'JMA2' of encl. 10A) was entered into between PJB Capital Holdings Bhd and the defendant. And, despite the fact that the plaintiff is the holding company of M/s PJB Capital Sdn Bhd it is trite that the two companies are

two separate and distinct corporate entities. It was not pleaded in the statement of claim that an agreement had been entered between the plaintiff and the defendant or that the defendant was a party to the alleged assignment. However, it is appreciated that the plaintiff company could acquire a cause of action if there occurred an assignment and the assignment was effected in compliance with the terms of the option agreement. Thus, the material facts and particulars making out a *prima facie* case of such assignment has essentially and vitally to be pleaded in the statement of claim. Such essential averments cannot be supplemented by affidavit evidence (see *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206). And indeed, even if so pleaded, the defendant's rebuttal by affidavit of such averment(s) in the statement of claim would have to be countered by the plaintiff also by affidavit (see *Ng Hee Thong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609). And, affidavits from both sides must condescend upon particulars (see *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 2 MLJ 303 and *Perbadanan Pembangunan Ekonomi Sarawak v. Sarawak Motor Industries* [1989] 3 MLJ 246), that is not inconsistent with or run counter to undisputed contemporaneous documents or other statements by the same deponent, or is inherently improbable in itself (see *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14). Also, in an O. 14 application for summary judgment, where a plaintiff has made out a credible *prima facie* cause of action, the *onus* rests on the defendant to show cause why leave to defend must be given, by providing answers on oath which constitute evidence in support of a defence which is fit to be tried (see *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690).

Nowhere, not even in para. 10 of the statement of claim, was it pleaded that the option agreement had been assigned to the plaintiff pursuant to cl. 19.2. Further, in para. 4 of his affidavit (encl. 7) the defendant averred that there was never any agreement entered between the plaintiff and the defendant, and this was not rebutted by the plaintiff. Hence, based on the trite principle of evidential law reiterated in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, the failure of plaintiff to contradict the positive assertion of the defendant that the defendant has never entered into any agreement with the plaintiff should be treated as an admission by the plaintiff of the fact so asserted. Also, in *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82, Mahader Shankar J had occasion to express this principle in more succinct language, as follows:

(1) Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.

(2) Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales.

To compound the plaintiff's predicament in the teeth of unsatisfactory pleadings that left much to be desired, their counsel himself conceded that plaintiffs affidavits do not contain any assertion that there was assignment of the put and call option, by PJB Capital Holdings to the plaintiff.

In any event, it is sufficiently apparent from the undisputed contemporaneous documents exhibited, that even if there was a valid assignment, the option agreement had expired by effluxion of time because the plaintiff had failed to exercise their rights within the option period, considering that there was no valid or sufficient notice served on defendant. The impugned notice dated 17 December 1997 (exh. JMA3 encl. 10A) was sent in a manner contrary to cl. 16.1 of the option agreement as: (i) it was forwarded by ordinary post and not by registered post (see *Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] 2 CLJ 761); (ii) it was sent to Capital Corp Securities Sdn Bhd and not to the defendant, and: (iii) it was sent to an address which is different from the defendant's address in the option agreement (see exhs. JMA3 and JMA5 encl. 10A). Without the notice there is no cause of action and the time frame for exercising the put and call option had lapsed.

Given all the aforesaid reasons and having carefully studied the pleadings in conjunction with the affidavits, and heard the oral submissions, I was entirely satisfied that the plaintiff failed to disclose a *prima facie* cause of action in their pleadings or any of their affidavits and their claim was doomed to failure. The registrar was right to allow striking out of the plaintiff's summons and statement of claim, and I dismissed the appeal with costs. It is incumbent upon the court to determine whether an action could more appropriately be decided without the expense of a full trial. This was such a case, considering the absence of any triable material in the claim placed before the court. See *Suppuletchmi v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561. It is surely a trite truism that success in litigation is dependent not merely upon the real probity of a litigant's case but how that real probity is squarely presented to the court through methodically crafted essential ingredients of pleadings (see *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157; *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196; *Farrel v. Secretary of State* [1980] 1 All ER 166; *Esso*

Petroleum Co Ltd v. Southport Corp [1956] AC 218; *Muniandy & Anor v. Muhamad Abdul Kader & Ors* [1989] 2 MLJ 416; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 156) as backed up by competent conduct of the case proper. It is, as viewed exclusively through the apex of the prism of pleadings, affidavits and evidence *viva voce* that a decider is able legitimately – nay legally – to discern the real probity of the case and adjudicate on it within the parameters of set rules and guidelines.